in the

Supreme Court
of the
United States

OCTOBER TERM, 1978

NO. 78-1587

HARRIS LEVESON, JR.

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

HIRSCHHORN AND FREEMAN, P.A.
By: JOEL HIRSCHHORN,
ESQUIRE
742 Northwest 12th Avenue
Miami, Florida 33136
Telephone (305) 324-5320

Counsel for Petitioner

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CASES CITED

in the

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OCTOBER TERM, 1978

NO.

HARRIS LEVESON, JR.,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

The Petitioner, HARRIS LEVESON, JR., respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on July 5, 1978.

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Third District, was entered on July 5, 1978,[1] affirming Petitioner's conviction and jail sentence. The District Court denied a timely Petition for Rehearing on September 2, 1978.[2] On January 17, 1979, the Supreme Court of Florida denied a timely Petition for Certiorari.[3] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether Petitioner was denied his right to due process under the Fourteenth Amendment when the Trial Court denied his Motion to Vacate his guilty plea and sentence where Petitioner had entered his guilty plea as a result of his belief that the trial judge had stated that Petitioner would not be incarcerated if it was clearly determined by a court-appointed physician that such incarceration would be harmful to Petitioner's health and where the court-appointed physician determined same unequivocally.

CONSTITUTIONAL PROVISION INVOLVED

The case sub judice involves Petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

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[1]See Appendix 4.

[2]See Appendix 5.

[3]See Appendix 6.

STATEMENT OF THE CASE

Petitioner, HARRIS LEVESON, JR., was charged by criminal information with a violation of the lottery provisions of Florida Statutes §§849.09(1)(d), (k), and (h) and with engaging in a conspiracy to aid and assist or abet a lottery contrary to Florida Statute §777.04.[4] As attorney for Petitioner, LEVESON, JOEL HIRSCHHORN sought to negotiate a plea on behalf of Petitioner by conferring with Dade County Assistant State Attorney MICHAEL VOIGT, both in and out of the presence of the presiding judge. As part of this effort, counsel submitted letters from Petitioner's personal physician to Assistant State Attorney VOIGT and to the Trial Court which stated that Petitioner suffered from substantial medical problems.[5]

On August 1, 1977, Mr. HIRSCHHORN and Mr. VOIGT met in the presence of the Trial Court, in chambers, but out of the presence of the court reporters and Petitioner. On that occasion the Trial Court led counsel to believe that if an impartial court-appointed doctor determined that imprisonment of Petitioner for 364 days would be harmful to or would jeopardize his health, then the Court would not impose a jail sentence.[6] Acting in reliance on this representation, counsel communicated what he believed was the Trial Court's intention to Petitioner, LEVESON.

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[4]The text of the applicable portions of the Florida Statutes are set forth in the Appendix at 1.

[5]See Appendix 8-9.

[6]See Appendix 10-13.

Later on that same day at the plea colloquy, Petitioner, in accordance with the negotiations described above and based on counsel's communication of the Trial Court's intention regarding a jail sentence,[7] pled guilty to the conspiracy count. Upon acceptance of the plea, the State Attorney "abandoned" the remaining counts of the information. The Trial Court questioned Petitioner about the voluntariness of his plea, his satisfaction with counsel, his belief that the plea was in his best interests, and his understanding of the rights given up by pleading guilty.[8] Petitioner was not asked by the Trial Court whether he had been promised or led to believe anything other than what was said at that time.

The Trial Court went on to state that although he would not make a promise as to the sentence, he was appointing a physician for the sole purpose of determining "whether . . . [Petitioner's] health would be placed in jeopardy for [sic] being incarcerated for any length of time . . . ."[9] Immediately following this, the Trial Court, in response to counsel's inquiry, stated that so long as the physician's report was "clear", he [the Trial Court] would not afford an adversary hearing on it [the medical report].[10]

After the State proffered the facts, the Trial Court accepted Petitioner's guilty plea and sentenced him to

[7]See Appendix 26-27, 30-40.

[8]See Appendix 10-13, 30-32.

[9]See Appendix 13, 32-34, 42-44.

[10]See Appendix 14-15, 33, 37.

five years probation with a special condition that Petitioner serve 364 days in the Dade County Stockade.[11] The Trial Court immediately stayed the jail sentence pending receipt of the court-appointed physician's report. On August 11, 1977, that report was presented to the Trial Court. It concluded that, "[Petitioner's] health would be in jeopardy if he was confined to the Dade County Stockade for a period of 364 days."[12]

Despite the court-appointed doctor's clear and unambiguous statement that imprisonment would imperil Petitioner's health and life, the Court refused to vacate the jail sentence and ordered Petitioner to surrender to the Dade County Stockade.

Petitioner thereafter filed a Motion to Vacate Plea and Sentence or in the Alternative to Compel Compliance With the Plea Bargain Negotiation as understood by Defendant, accompanied by affidavits of Petitioner and his counsel[13] raising the issues set forth herein.

Upon denial by the Trial Court, Petitioner appealed to the District Court of Appeal of Florida, Third District, seeking to overturn the Trial Court's refusal to

[11]Under prevailing Rules and Regulations of the Florida Parole and Probation Commission, persons serving county jail sentences are not eligible for early parole but rather receive only statutory "gain time" as a result of which Petitioner is likely to serve approximately 300 to 320 days of the jail sentence. See Appendix 38.

[12]See Appendix 45-47.

[13]See Appendix 16-21, 48-56.

grant the relief sought. The District Court of Appeal affirmed the Trial Court without an opinion,[14] and denied the subsequent Petition for Rehearing.[15] Following this, the Supreme Court of Florida denied the Petition for Writ of Certiorari to the Third District.[16]

Petitioner has been serving his probationary sentence since the 26th day of September, 1977, but has not yet served his special condition pending the outcome of the appeal and now this Petition for Writ of Certiorari.[17]

REASONS FOR GRANTING THE WRIT

The decisions of the Trial Court and the District Court of Appeal of Florida, Third District, do not reflect a determination of Petitioner's right to due process in accord with the decisions of this Court in *Blackledge v. Allison,* 431 U.S. 63 (1977), and *Santobello v. New York,* 404 U.S. 257 (1971). In those cases, the "serious constitutional question" of a knowing and voluntary guilty plea was raised in light of the belief and understanding by a defendant that he was making that plea in exchange for specific treatment of his case by the Trial Court and/or the prosecution. 431 U.S. at 75 n. 8, 404 U.S. at 262.

The voluntary nature of a guilty plea is determined in light of the defendant's awareness of its consequences, and "any commitments made to him by the court, prosecutor, or his own counsel . . ." *Brady v.*

[14]Appendix 4.

[15]Appendix 5.

[16]Appendix 6.

[17]Petitioner has been directed to commence service of the jail sentence at 9:00 AM April 25, 1979.

United States, 397 U.S. 742, 755 (1970). As the affidavits appended hereto demonstrate, Petitioner's counsel understood prior to the plea colloquy that if any impartial court-appointed physician (as opposed to Petitioner's own doctor) determined that imprisonment would jeopardize Petitioner's health, then the Trial Court would not impose a jail sentence.[18] This was, of course, in "exchange" for Petitioner's plea of guilty. Counsel conveyed this information to Petitioner who in reliance thereon agreed to plead quilty.[19]

The questioning of Petitioner by the Trial Court at the plea colloquy did not indicate to Petitioner that his understanding was in error. The Court in fact confirmed Petitioner's belief by stating that it was appointing a physician to determine whether his health would be jeopardized by incarceration, and that there would not even be a need for an adversary hearing if the report was "clear".[20]

The general questioning of Petitioner by the Court did not meet the standards approved by this Court in *Blackledge, supra.* For example, there was not "[s]pecific inquiry about whether a plea bargain has been struck . . . not only of the defendant, but also of his counsel and the prosecutor." 431 U.S. at 79. While those standards are not exclusive, the failure of the Trial Court to question Petitioner's counsel, or to ask Petitioner about representations made to him by his

[18]Appendix 48-51, 32, 33, 38, 42-43.

[19]See Footnote 17, and Appendix 52-55.

[20]Appendix 33.

counsel prevented Petitioner from having the full understanding necessary to establishing the "voluntary" character to his plea.

The invaluable clarification by this Court of the acceptable and often necessary role of plea bargaining through decisions like *Brady, supra, Santobello, supra,* and *Blackledge, supra,* has removed many clouds from this "important component of this country's criminal justice system." *Blackledge, supra,* 431 U.S. at 71. Yet, its benefits accrue only through "safeguards to insure the defendant what is reasonably due in the circumstances." *Santobello, supra,* 404 U.S. at 262. Further, clarification and guidelines by this Court upon the occurrence of a situation like the one presented herein will aid in the implementation of those safeguards and will operate not only to insure that a defendant, like Petitioner LEVESON, does not lose the benefit of his bargain but will also provide needed direction to federal, state, and local law enforcement officials and judicial officers as to what those safeguards must be.

CONCLUSION

The Petitioner herein was denied basic fundamental rights guaranteed to him by the Constitution of the United States. Based on the arguments and authorities cited herein, Petitioner, HARRIS LEVESON, JR., urges this Honorable Court to grant this Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, and vacate his plea of guilty, and order that the Trial Court either enter a plea of not guilty and thereafter permit this matter to proceed to trial or in the alternative impose a sentence consistent with the plea bargain agreement, Petitioner's reasonable belief, and the court-appointed physician's unequivocal medical conclusion.

Respectfully submitted,

HIRSCHHORN AND
FREEMAN, P.A.
Counsel for Petitioner
742 Northwest 12th Avenue
Miami, Florida 33136
Telephone (305) 324-5320

By: _____
JOEL HIRSCHHORN

APPENDIX

INDEX

UNITED STATES CONSTITUTION

AMENDMENT XIV.

§1. *Citizenship rights not to be abridged by states*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES ANNOTATED

849.09 *Lottery prohibited; exceptions*

(1) It shall be unlawful for any person in this state to:

* * *

(d) Aid or assist in the setting up, promoting or conducting of any lottery or lottery drawing, whether by writing, printing or in any other manner whatsoever, or be interested in or connected in any way with any lottery or lottery drawing;

* * *

(h) Have in his possession any lottery ticket, or any evidence of any share or right in any lottery ticket,

or in any lottery scheme or device, whether such ticket or evidence of share of right represents an interest in a live lottery not yet played or whether it represents, or has represented, an interest in a lottery that has already been played;

* * *

(k) Have in his possession any so-called run down sheets, tally sheets, or other papers, records, instruments, or paraphernalia designed for use, either directly or indirectly, in, or in connection with, the violation of the laws of this state prohibiting lotteries and gambling.

FLORIDA STATUTES ANNOTATED

777.04 *Attempts, solicitation, conspiracy, generally*

(3) Whoever shall agree, conspire, combine, or confederate with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4).

UNITED STATES CODE ANNOTATED
28 U.S.C.A. §1257(3)

§1257. *State courts; appeal; certiorari*

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in

question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1978

HARRIS LEVESON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 77-2496

Opinion filed July 5, 1978.

An Appeal from the Circuit Court for Dade County, Ellen J. Morphonios, Judge.

Hirschhorn & Freeman and Joel Hirschhorn, for appellant.

Robert L. Shevin, Attorney General and Calvin L. Fox, Assistant Attorney General, for appellee.

Before PEARSON, BARKDULL and HUBBART, JJ.

PER CURIAM.

Affirmed. See *Haro v. State*, 314 So.2d 236 (Fla. 3d DCA 1975).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1978

WEDNESDAY, SEPTEMBER 6, 1978

HARRIS LEVESON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 77-2496

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

/s/Louis J. Spallone
Clerk District Court of
Appeal, Third District

SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 17, 1979

HARRIS LEVESON, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 55,198

District Court of Appeal,
Third District
77-2496

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, HATCHETT and ALDERMAN, JJ., concur

A True Copy
ATTEST:

Sid J. White
Clerk Supreme Court.
By: /s/ Tanya Carroll
Deputy Clerk

July 23,1977

Mr. Joel Hirschorn,
742 North West 12th Avenue,
Miami, Florida 33136.

Re;Mr. Harris Leveson

Dear Mr. Hirschorn:

Since my last reports to you relative to the medical condition of Mr. Harris Leveson dated March 16th and April 15th, 1977, this patient has been followed medically for his post-surgical gastro-enterological and cardiac condition.

The original Gastro-Surgical condition naturally still persists inasmuch as we are still faced with the uncertainty of any metastatic spread of any unfound carcinoma;- the chronic Diverticulitis Coli, the recurrent Duodenitis and Gastric Ulcer problems all requiring a meticulous, careful diet to prevent reoccurance of these pre-existing infections of the gastric tract.

We are now faced with a flare-up of a pre-existing Cardiac problem wherein frequent Extra-Systolic irregular heart contractions have caused frequent episodes of dangerous Paroxysmal Atrial Fibrillation of the Heart.

On two recent occasions it was necessary to abort an attack of dangerous cardiac Atrial Fibrillation by resorting to the combined use of Quinidine and Carotid stimulation. At present he is now in Sinus Rythm but drops Premature Ventricular Contractions at irregular intervals when tachycardia occurs.

To Summarize:- we are faced with a severe Gastro-Intestinal problem of post-surgical care, a recurrent Diverticulitis Coli, a recurrent Duodenitis with frequent reactivation of a post-bulbar Gastric Ulcer, and now complicated by Cardiac Paroxysmal Atrial Fibrillation attacks.

Future medical care *must* consist of a very carefully-controlled diet, monitoring of the cardiac picture so that no Cardiac-Arrest should occur resulting in a sudden death from the paroxysmal atrial fibrillation attacks triggered by stress events, sudden bradycardia, or over-exertion under stress.

Mr. Leveson has been warned of the consequences of deviating from a carefully-controlled low residue bland diet, adequate rest, maintaining careful professional cardiac evaluation with the proper medication adjustment, and the necessity of avoiding stress or over-activity. He has also been made aware of the uncertainty of his post-surgical results, which only time can help evaluate as to the possible spread or non-spread of the colon lesion.

Trusting that this information might be of some assistance in your evaluation of our medical problems facing this kind, but very ill Mr. Leveson, I remain

Yours Sincerely,

/s/ Leonard H. Jacobson
Leonard H. Jacobson, M.D.

LHJ:j

THE DEFENDANT: Yes, Sir.

THE COURT: Do you understand after you have served the six months in the stockade, if you violate any of the conditions of probation after hearing, the Court can terminate your probation and sentence you up to five years, or such time you would have served; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I'll take a proffer of facts after I take the plea on Mr. Leveson.

MR. VOIGT: All right, Your Honor.

MR. HIRSCHHORN: Mr. Leveson?

THE COURT: Swear the Defendant, please. (Whereupon Defendant Leveson, was sworn.)

THE COURT: Mr. Leveson, do you wish to plead guilty to the charge of conducting a lottery between September 19, 1976 and October 19, 1976?

THE DEFENDANT: Yes.

THE COURT: The maximum penalty for this offense if you were tried and convicted would be five years and the minimum would be probation; do you understand that?

THE DEFENDANT: Yes, sir.

[R-9]

THE COURT: Has anybody forced you against your will to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you doing so freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit you're guilty of this offense?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had sufficient time to discuss this case and your case with your attorney, Mr. Hirschhorn?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with his services?

THE DEFENDANT: Yes, sir.

THE COURT: These are the rights that you give up by pleading guilty: Because there won't be a trial, you're giving up your right to trial by jury, to determine your guilt or innocence, and you're giving up your right to face your accusers, that is, the witnesses the State would present at a trial and your attorney would have a right to cross examine those witnesses. You have a right to remain silent, which means you wouldn't have to testify at [R-10] a trial, unless you wanted to and the State would have a burden of proving your guilt, beyond

a reasonable doubt if you went to trial, and you would not have to prove your innocence, or produce any evidence whatsoever. You too, would have a right to have witnesses summoned and appear and testify on your behalf. By pleading guilty, since there won't be a trial, you give up all of these rights, including your right to appeal the issue of your guilt or innocence and judgment and sentence of the Court; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel this plea is in your best interest?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand if I accept your plea, I'm going to adjudicate you guilty and as a condition of five years probation, you're going to have to serve 364 days — 364 days in the county stockade and I'm going to have to have you examined by the county physicians based on the report I've seen from two of the doctors, Dr. Kaplan, who's [R-11] a Gastrointerologist and Dr. Jacobson, I think were the two doctors?

MR. HIRSCHHORN: I only have letters from one doctor, Dr. Jacobson.

THE COURT: That's the only report I saw.

MR. HIRSCHHORN: Leonard A. Jacobson, one of —

THE COURT: That's the one I saw the other day.

MR. HIRSCHHORN: Right.

THE COURT: All right.

I'm not making any promises. After I read the report from the Court appointed physician, I may let the sentence stand as far as the incarceration is concerned. The probation is certain, five years. The only reason I'm getting a report, is to determine whether you should serve the 364 days as a condition of probation, or any lesser days, but I'm making you no promises in that regard. I'm just going to examine the report and make a determination myself, as to whether your health would be placed in jeopardy for being incarcerated for any length of time; do you understand that?

MR. HIRSCHHORN: Judge, excuse me.

[R-12]

THEREUPON, the following proceedings were had:

THE COURT: Harris Levenson.

MR. HIRSCHHORN: Judge, this is on for report pursuant to the Court's Order of approximately 22 days ago, August 10th, 1977, directing a medical — appointing a medical doctor to examine the Defendant, and further pursuant to the plea negotiation with the

Court in this case. The Court appointed Dr. Iyengar, head of Cardiology at St. Francis Hospital to examine Mr. Levenson, and thereafter, to report to the Court his medical finding with respect to the Defendant's condition, and in addition, should advise the Court based upon reasonable medical certainty whether Mr. Levenson is able to serve a period of 364 days in the Dade County Stockade without jeopardizing his life or seriously impairing his health.

Thereafter, I received a report dated August 11th, from Dr. Iyengar — a copy of the report. The original, which is addressed to the Court and I see is in the file, in which Dr. Iyengar concluded:

> "In view of the multiple medical problems which needs special dietary restrictions along with constant medical care, I feel that his health would be in [R-24] jeopardy if he was confined to the Dade County Stockade for a period of 364 days."

My understanding was that the Court would accept the plea; place the Defendant on the probation. Made a special condition of probation that he would be incarcerated in the Dade County Stockade.

The Court indicated that that special condition was based in part by the Court's concern for the Defendant's health as a result of a letter from Dr. Jacobson, Mr. Levenson's personal physician.

The Court also indicated that the plea disposition — that if either party wanted an adversary hearing,

either the State or I, could request one. That was in the case Dr. Iyengar's report was less than crystal clear.

It seems to me Dr. Iyengar's report is crystal clear. I looked through the file to see if the specific plea negotiation — if the specific condition and plea was printed. I know it is the Court's policy to direct a Court Reporter to print all pleas for the record, and it is not yet in the file.

I would like the opportunity to examine that in specific language of the Court's condition in the event the Court is going to impose a 364 day jail sentence in light of Dr. Iyengar's report. I would . . .

[R 25]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 76-9035 (RIVKIND)

THE STATE OF FLORIDA,

Plaintiff,

vs.

HARRIS LEVESON

Defendant

MOTION TO VACATE PLEA, RECUSE TRIAL COURT, OR, IN THE ALTERNATIVE, TO COMPEL COMPLIANCE WITH PLEA BARGAIN NEGOTIATION AS UNDERSTOOD BY DEFENDANT.

COMES NOW the Defendant, HARRIS LEVESON, by and through his undersigned attorney, and respectfully moves this Honorable Court for the entry of an Order pursuant to Rule 3.850, F.R.Cr.P., to permit the Defendant to withdraw his plea of "Guilty," vacate the Defendant's plea of "Guilty," request the Trial Court to recuse itself from all further proceedings herein, and/or, in the alternative, compel compliance with the plea negotiations as understood by the Defendant and, as grounds therefor, the undersigned would show as follows:

1. On or about August 1, 1977, the Defendant, HARRIS LEVESON, JR., acting upon reliance of counsel, and the advice given to him by counsel based upon negotiations and discussions counsel had had in Chambers outside the Defendant's presence with the Hon. Leonard Rivkind, the Defendant entered his plea of "Guilty" to the Court pursuant to an understanding on the part of the Defendant wherein the Defendant would plead guilty to the felony set out in Count 2 of the Information, and the Court would impose a period of probation, to be set by the Court, a special condition of which would be that the Defendant would serve 364 days in the Dade County Stockade and, [R-78] further, that the Court would appoint a medical doctor to examine MR. LEVESON to determine whether incarceration would be harmful to and/or jeopardize his health.

2. Pursuant to said understanding, the Defendant did tender his plea and the Court proceeded to qualify said plea, concluding thereafter that the plea was knowingly and voluntarily made. A copy of the transcript of the Defendant's plea and the colloguy between the undersigned counsel, the Defendant, the Court, and Assistant State Attorney Michael Voigt is attached hereto and marked Defendant's Exhibit 1 as if set forth more fully herein.

3. While the colloquy reflects that the trial court said on several occasions it was *not* making any promises as to what it would do, the transcript also clearly reflects that the Court led the Defendant and the undersigned counsel to believe that if the court-appointed doctor indicated that incarceration would be harmful to the Defendant's health or jeopardize same, the Court would not require the Defendant to serve the

364-day jail sentence. Thereafter, the Court appointed one doctor (Dr. Kaplan), who was unable or unwilling to serve as the court-appointed physician. Subsequently the Court appointed Dr. Ramanuja Iyengar, head of Cardiology at St. Francis Hospital, Miami Beach, Florida. A copy of the Court's Order appointed Dr. Iyengar is attached hereto and marked Defendant's Exhibit 2.

4. Pursuant to the Order of this Court, Dr. Iyengar proceeded to examine the Defendant and submit a written report to this Court, which written report *unequivocally* states that incarceration in the Dade County Stockade for 364 days would jeopardize the Defendant's health in light of his medical condition. A copy of Dr. Iyengar's report is attached hereto as Plaintiff's Exhibit 3.

5. Apparently, upon receipt of Dr. Iyengar's letter, the Court engaged in an off-the-record telephone [R-79] conversation with Dr. Iyengar, as a result of which the Court arrived at some conclusions with respect to the Court's ability to impose or require the Defendant to serve the 364 days in the Stockade. The undersigned is informed and does believe that Dr. Iyengar repeated to this Court his conclusion that incarceration would be harmful and/or likely to jeopardize the Defendant's health, but despite same, the Court proceeded on or about August 22, 1977 to state in the record that the Court was going to require the Defendant to serve the 364 days in the Stockade with a special condition (not previously discussed with the undersigned or Defendant by the Court), that the Court would consider releasing the Defendant every 30 days from the Stockade to see his own personal physician.

6. Attached hereto and marked as Defendant's Exhibit 4 is the undersigned's Affidavit in support of this Motion, which alleges in greater detail the undersigned's clear and unequivocal understanding following numerous discussions with this Court that this Court would *not* require the Defendant to serve a jail sentence if the court-appointed physician unequivocally reported to the Court that to require the Defendant to serve said jail sentence would be harmful and/or jeopardize the Defendant's health.

7. Despite the above and foregoing, and despite the attached Exhibits, on August 22, 1977, this Court announced that the Defendant would have to commence serving his jail sentence and designated September 26, 1977 as the date on which the Defendant was to surrender in open court to commence serving his sentence.

8. The undersigned, as attorney for the Defendant and on behalf of the Defendant, would show that the Defendant's plea of "Guilty" was not freely and voluntarily made in light of the misunderstanding between counsel and/or the Court and Defendant, or in light of the Court's failure [R-80] to abide strictly and completely with the understood plea negotiation which is part of the record herein and, as a result, the Defendant's plea should properly be set aside or, in the alternative, this Court should vacate its previous Order directing the Defendant to serve the 364 days in the Dade County Stockade and abide by its previous agreement.

9. Significantly, nowhere in the transcript of the plea colloquy does the Court ask the Defendant HARRIS LEVESON if any promises other than that set

forth in the record have been made to him by anyone. While the undersigned could not clearly promise, as a mere attorney, what the Court would do, the undersigned clearly has responsibility under Rule 3.171(c), F.R.Cr.P., to communicate all plea discussions, offers and negotiations to the Defendant. This the undersigned did do relying upon what was told the undersigned by the Hon. Leonard Rivkind and the clear implications, inferences, and suggestions from the conversations the undersigned had with the Hon. Leonard Rivkind to the effect that *if the court-appointed doctor indicated the Defendant's health would be jeopardized by being required to serve 364 days in the Stockade, then the Trial Court would not require the Defendant to serve said sentence.* The court-appointed doctor did so unequivocally indicate and the Court has breached the plea negotations made and reached directly with the Court, as a result of which the Defendant's Guilty plea has been tained, vitiated and was unconstitutionally obtained and should therefore be set aside and vacated.

WHEREFORE, the undersigned prays that this Honorable Court will vacate the Defendant's plea, recuse itself from further proceedings herein, transfer this cause to another Court for disposition and/or, in the alternative, comply with the clear understanding and plea agreement herein.

Respectfully submitted,

HIRSCHHORN & FREEMAN, P.A.
742 N.W. 12th Avenue
Miami, Fla. 33136
By /s/ Joel Hirschhorn
JOEL HIRSCHHORN

[R-81]

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was hand delivered to MICHAEL VOIGT, Assistant State Attorney, 1351 N.W. 12th Street, Miami, Florida this 15th day of September, 1977.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

[R-82]

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 76-9035A and 76-9035B

THE STATE OF FLORIDA,
Plaintiff,

vs.

HARRIS LEVESON and ROBERT JENKINS,
Defendants.

Transcript of proceedings had and testimony taken in the above-entitled matter before the Honorable LEONARD RIVKIND, Circuit Court Judge, at the Metropolitan Justice Building, Miami, Dade County, Florida, on Monday, August 1, 1977, commencing at or about 9:00 o'clock a.m.

APPEARANCES:

MICHAEL VOIGT, ESQ.,
Assistant State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

JOEL HIRSCHHORN, ESQ.,
On behalf of the Defendant
742 N.W. 12th Avenue
Miami, Florida

[R-83]

THE COURT: Let's go back on the miscellaneous.

Harris Levenson and Robert Jenkins.

MR. VOIGT: Michael Voigt, on behalf of the State Attorney's Office.

MR. HIRSCHHORN: Joel Hirschhorn on behalf of the Defendants.

Your Honor, I think we have a plea to the Court, which the State has been participating in and Mr. Voigt and I have an understanding of what the Court will do in most areas. I think we have perhaps a little confusion that perhaps the Court can assist us with.

On behalf of Mr. Jenkins, the Defendant — it was never clear whether the Defendant would have to plea to one or all the counts. The Defendant Jenkins would move the Court to withdraw his plea of not guilty to Count 2, which is a felony and enter a plea of guilty to Count 2 and the Court would impose a six month period of probation and some — excuse me, that's a six month incarceration in the stockade and some period of probation to be set by the Court.

With respect to Patricia Erikson Lester, I am confused now, whether the Court said the plea would have to be to a felony, or a misdemeanor [R-84] count.

THE COURT: I didn't say.

MR. VOIGT: There was no discussions as to the State or Defense Counsel.

My understanding was that it was a straight up plea to the Court.

MR. HIRSCHHORN: If that's so, we would withdraw our plea of not guilty to Count 4 and enter a plea of guilty. Count 4 is a misdemeanor; however, Ms. Lester's involvement in this latter, is significantly small in comparison. She has absolutely no priors.

The pre-sentence investigation in this matter reflects—

THE COURT: If the State is going to abandon the other counts — I can accept the plea to that count, but I can't require the State to abandon the other counts.

MR. HIRSCHHORN: I understand that the only reason there is a problem, Judge, is that Ms. Lester, as the pre-sentence investigation reflects, is employed in Monroe County and the Florida Beverage Commission has indicated she would not be prevented from working in the liquor industry if she's not adjudicated. It's a question of whether a plea of [R-85] guilty, or no contest to a felony, might not have some effect.

In any event, my understanding was that the Court would impose a probationary period on Ms. Lester and withhold adjudication.

THE COURT: That's correct. Eighteen months probation with a withhold of adjudication.

MR. VOIGT: For the Record, Your Honor, the State has revealed the P.S.I. and the police officers would request an adjudication.

THE COURT: But to give 18 months probation, she would have to plead to the felony count, because the others would me a maximum of one year.

MR. HIRSCHHORN: All right.

If that was the Court's position, we'll plead to the felony with, or withhold.

THE COURT: The two years over is out now.

MR. HIRSCHHORN: Judge, we had a problem. I may have mislead Ms. Lester, because I was not aware of the fact that we had not discussed which one of the counts—

THE COURT: Do you want me to put this over for you?

MR. HIRSCHHORN: Perhaps we could just [R-86] put her's over?

THE COURT: Sure.

MR. HIRSCHHORN: The plea we have, Judge, I'm afraid if she pleads, even if you withhold, she's not going to be able to work.

THE COURT: Put it on for Friday.

MR. HIRSCHHORN: I think Friday would be all right, Judge.

THE COURT: Beg your pardon?

MR. HIRSCHHORN: I think that's all right. I would hope the State would also have a chance to talk to the police officer in this matter about their position.

MR. VOIGT: I will attempt to, Your Honor, but the police officers are attempting an adjudication. They would want a plead to the felony.

THE COURT: They want a recommendation where she would be adjudicated, but I would agree to withhold, but I'll put it on for August 5th, 9:00 a.m. for report re plea.

MR. HIRSCHHORN: That's for her?

THE COURT: Yes.

MR. HIRSCHHORN: With respect to Mr. Leveson, I understood we could plead to the felony. I would suggest the felony of Count 2.

[R-87]

MR. VOIGT: That's the only felony.

MR. HIRSCHHORN: The Defendant would receive a period of probation to be set by the Court and the Court would make a special condition of the probation that the Defendant serve 364 days in the stockade and that the Court would appoint an—an internist to examine Mr. Leveson to determine his medical condition, to see if his medical condition would be sufficient that based upon reasonable medical certainty, incarceration would be harmful to his health.

Here, incarceration wouldn't be of benefit to him or the system. The Court has a letter of Dr. Jacobson, which I have given to the Court.

THE COURT: I have read the letter.

Have you seen the letter?

MR. VOIGT: Yes.

MR. HIRSCHHORN: March 19, 1977, April 15, 1977 and July 23, 1977, and as a result of these letters, the Court has indicated concern for the Defendant's health.

THE COURT: We will take Mr. Jenkins first.

Would you swear Mr. Jenkins, please? (Whereupon Defendant Jenkins, was sworn.)

[R-88]

THE COURT: Mr. Jenkins, do you wish to plead guilty to the felony charge of conducting a lottery between September 17, 1976 and November 19, 1976?

THE DEFENDANT: Yes.

THE COURT: The maximum penalty for this offense is five years and the minimum is probation; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand if I accept your plea, I'm going to place you on probation for a period of three years with the special condition of probation that you're to serve six months in the county stockade and you will be adjudicated guilty; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Has anybody forced you against your will to plead guilty?

THE DEFENDANT: No.

THE COURT: Are you doing so freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit you're guilty?

THE DEFENDANT: Yes, sir.

[R-89]

THE COURT: You understand that you're giving up your right to trial by jury and your right to face the witnesses the State would present at a trial, and your attorney would have a right to cross examine those witnesses. You would not have to testify at a trial, unless you wanted to and the State would have the burden of proving your guilt beyond a reasonable doubt. You too, would have the right to have witnesses summoned and appear and testify on your behalf. By pleading guilty, since there won't be a trial, you give up all of these right, including your right to appeal the issue of your guilt or

innocence and judgment and sentence of the Court; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you think this plea is in your best interest?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the services of Mr. Hirschhorn?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had any drugs or any other medications during the past 72 hours?

THE DEFENDANT: No, sir.

THE COURT: Do you understand what's [R-90] going on here now?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand after you have served the six months in the stockade, if you violate any of the conditions of probation after hearing, the Court can terminate your probation and sentence you up to five years, or such time you would have served; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I'll take a proffer of facts after I take the plea on Mr. Leveson.

MR. VOIGT: All right, Your Honor.

MR. HIRSCHHORN: Mr. Leveson?

THE COURT: Swear the Defendant, please? (Whereupon Defendant Leveson, was sworn.)

THE COURT: Mr. Leveson, do you wish to plead guilty to the charge of conducting a lottery between September 19, 1976 and October 19, 1976?

THE DEFENDANT: Yes.

THE COURT: The maximum penalty for this offense if you were tried and convicted would be five years and the minimum would be probation; do you understand that?

THE DEFENDANT: Yes, sir.

[R-91]

THE COURT: Has anybody forced you against your will to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you doing so freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit you're guilty of this offense?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had sufficient time to discuss this case and your case with your attorney, Mr. Hirschhorn?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with his services?

THE DEFENDANT: Yes, sir.

THE COURT: These are the rights that you give up by pleading guilty: Because there won't be a trial, you're giving up your right to trial by jury, to determine your guilt or innocence, and you're giving up your right to face your accusers, that is, the witnesses the State would present at a trial and your attorney would have a right to cross examine those witnesses. You have a right to remain silent, which means you wouldn't have to testify at [R-92] a trial, unless you wanted to and the State would have a burden of proving your guilt, beyond a reasonable doubt if you went to trial, and you would not have to prove your innocence, or produce any evidence whatsoever. You too, would have a right to have witnesses summoned and appear and testify on your behalf. By pleading guilty, since there won't be a trial, you give up all of these rights, including your right to appeal the issue of your guilt or innocence and judgment and sentence of the Court; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel this plea is in your best interest?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand if I accept your plea, I'm going to adjudicate you guilty and as a condition of five years probation, you're going to have to serve 364 days — 364 days in the county stockade and I'm going to have to have you examined by the county physicians based on the report I've seen from two of the doctors, Dr. Kaplan, who's [R-93] a Gastrointerologist and Dr. Jacobson, I think were the two doctors?

MR. HIRSCHHORN: I only have letters from one doctor, Dr. Jacobson.

THE COURT: That's the only report I saw.

MR. HIRSCHHORN: Leonard A. Jacobson, one of —

THE COURT: That's the one I saw the other day.

MR. HIRSCHHORN: Right.

THE COURT: All right.

I'm not making any promises. After I read the report from the Court appointed physician, I may let the sentence stand as far as the incarceration is concerned. The probation is certain, five years. The only reason I'm getting a report, is to determine whether you should serve the 364 days as a condition of probation, or any lesser days, but I'm making you no promises in that regard. I'm just going to examine the report and make a determination myself,, as to whether yourself would be placed in jeopardy for being incarcerated for any length of timee; do you understand that?

MR. HIRSCHHORN: Judge, excuse me. [R-94] If the Court appointed physician submits a report, will either the State or Defense have an opportunity to request an adversary hearing in cross examination of the doctor?

THE COURT: No, I'll make you no promise. It depends on what the report says. If the report is clear, I don't—I wouldn't go to the extent of having the doctor brought in to testify to what he says in the report. If there is anything in the report that requires a resolution, I will afford you a hearing.

Now, is there any other disposition made, other than what the Court just said?

All right.

I didn't bring in Dr. Jacobson either, I accept the report.

MR. HIRSCHHORN: But Dr. Jacobson's report was clear. Judge, the only issue, Judge, is rather than

use the standard form that — when you appoint the doctor, I would like to submit an order under similar circumstances where Mr. Leveson — I will try to track that and submit it to the Court first.

THE COURT: I will appoint Dr. Sherman Kaplan and you might talk to him, Mr. Hirschhorn, and advise him of the appointment. I'm sure he's going to be reluctant to accept any kind of Court appointment [R-95] in any matter, but if you advise him it's an examination and the results of his examination can be submitted in writing to the Court and it will most likely, involve his personal appearance, he may be willing to accept the appointment. Otherwise, I'm not certain he will.

MR. VOIGT: Is he on Miami Beach?

THE COURT: Yes, he is from Kaplan, Furlong, (Phonetic), Jaffe — I'm not sure of the rest of it. I think it is in the Meridian Medical Building, unless he's moved.

MR. HIRSCHHORN: It's possible that Mr. Leveson may have seen Dr. Kaplan in the past.

THE COURT: He is a doctor of internal medicine, specialized cardiologist?

THE DEFENDANT: Yes, sir, but I don't know his first name.

MR. HIRSCHHORN: I will check.

THE COURT: All right.

Unless you both have a recommendation, I will be glad to follow another recommendation if you have one.

MR. HIRSCHHORN: All right, sir.

THE COURT: Mr. Levenson, have you had any drugs or any other medication during the past 72 hours?

[R-96]

THE DEFENDANT: No, sir.

THE COURT: Do you understand what's going on here, now?

THE DEFENDANT: Yes.

THE COURT: Would the State proffer the facts, please?

MR. VOIGT: As to both Defendants, sometime in September of last year, the office of the Public Safety Department conducted a surveillance which ended, or resulted in an Information being filed in another Court. Subsequent to that, they have conversations with a C.I., who informed the officer that some lottery operation was still working; however, it was going to a new counting house.

Based upon that operation, September 15, the officers conducted a surveillance which resulted in the search warrant being issued October 19, at Mr. Jenkins' house and Mr. Leveson — Mr. Jenkins was found inside with lottery paraphernalia and Mr. Jenkins made com-

ments to the fact that he and him, referring to Mr. Leveson had only been involved the last three weeks.

Two more search warrants were executed at Mr. Leveson's residence; however, no evidence was found at it, or at the two residences.

[R-97]

THE COURT: All right.

Mr. Leveson, do you still wish to plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: As to Robert Jenkins, the Court finds the Defendant is now alert and intelligent, and understands the nature of the charge and consequences of the plea. The plea is freely and voluntarily made and there is a factual basis of the plea of guilty.

The Court will accept the guilty plea, find and adjudicate the Defendant guilty of Count 2 of the Information.

MR. HIRSCHHORN: For the Record, obviously, we have had a pre-plea pre-sentence investigation and Mr. Jenkins has asked that he be given a one week stay. He lives by himself.

MR. VOIGT: No objection by the State.

THE COURT: Sentence will be three years probation with special condition of probation to be that

Defendant is to serve six months in the county stockade. Show him the standard conditions of probation, please.

I'm going to have Mr. Leveson surrender [R-98] on August the 22, to afford us an opportunity to evaluate the report that we're going to receive. You want me to have Mr. Jenkins enter at the same time?

MR. HIRSCHHORN: He's ready to start next Monday.

THE COURT: All right.

August 8, at 9:00 o'clock a.m., report regarding surrender on Mr. Jenkins.

I want you to read the conditions of probation first and if you understand them, I want you to sign them.

Jane, on the reverse side, place him to serve six months in the county stockade and he should initial that also.

MR. HIRSCHHORN: You indicated Mr. Leveson would come for surrender on August 22, did you say?

THE COURT: Should have the report by then.

MR. HIRSCHHORN: You're talking about a report date, not surrender?

THE COURT: I haven't made up my mind. I can give him more time on August 22, if only — unless he wants to—

MR. HIRSCHHORN: I'll make every [R-99] effort to get to the Doctor.

MR. VOIGT: Based upon the Court's acceptance to the plea of Count 2, the State is abandoning Counts 1, 3, and 4.

THE COURT: With reference to Leveson, the Court finds the Defendant is now alert and intelligent and understands the nature of the charge and consequence of his plea. That the plea is freely and voluntarily made and there is a factual basis for the plea of guilty.

The Court will accept the guilty plea and adjudicate the Defendant guilty of Count 2 of the Information. The sentence will be five years probation with a special condition of probation that the Defendant will serve 364 days in the county stockade.

The Court will appoint Dr. Sherman Kaplan for the purpose of physical examination. The Defendant will remain at liberty pending disposition.

Set it for report re-evaluation August 22nd, at 2:00 p.m.

MR. HIRSCHHORN: Thank you, Your Honor.

THE COURT: Both Defendants are on bond at the present time?

[R-100]

MR. HIRSCHHORN: Yes, Your Honor.

THE COURT: The Court will continue bond in force and effect, on Mr. Leveson and Mr. Jenkins.

MR. HIRSCHHORN: Perhaps Mr. Leveson's case could report out Friday so I could report back to the Court. Perhaps it could read out on Friday along with Ms. Lester's case so I could report to the Court regarding Dr. Kaplan.

THE COURT: Report re status on Mr. Leveson on August the 8th, at 9:00 o'clock a.m.

MR. VOIGT: Thank you, Your Honor.

THE COURT: Would you show Mr. Leveson the standard conditions of probation also, please?

MR. HIRSCHHORN: He is looking at them, I need Mr. Jenkins'.

THE COURT: All right.

MR. HIRSCHHORN: Mr. Jenkins has read the conditions of probation and I have read it to him, actually.

THE COURT: Sign the face sheet and initial the special conditions of the six months on the reverse side.

MR. HIRSCHHORN: Mr. Leveson—

THE COURT: May I have the form on [R-101] Mr. Leveson? I have to fill out the reverse side on the condition of probation.

MR. HIRSCHHORN: He's already signed it. Put your initials down there.

THE COURT: All right.

MR. HIRSCHHORN: Thank you, Your Honor.

(Thereupon, the proceedings were concluded.)

[R-102]

CERTIFICATE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, WILLIAM MITCHELL, Court Reporter, do hereby certify that I was authorized to report the transcript of hearing before the Honorable LEONARD RIVKIND, Circuit Court Judge, on August 1, 1977; that the within transcript, pages 1 through 20, represents a true and accurate record of my shorthand notes taken at that time.

DATED at Miami, Florida, this 1st day of September, 1977.

/s/ William Mitchell
COURT REPORTER

[R-103]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NO. 76-9035A

STATE OF FLORIDA

VS.

HARRIS LEVENSON, JR.,
Defendant

ORDER APPOINTING MEDICAL DOCTOR AND DIRECTING EXAMINATION

THIS CAUSE Having come on to be heard and the Court having placed the defendant on five years probation one condition of which is that the defendant shall serve three hundred sixty-four days in the Dade County Stockade, and the Court having had before it the written medical reports of the defendant's doctor, LEONARD H. JACOBSON, and being otherwise fully advised in the premises, it is thereupon [R-104]

ORDERED and ADJUDGED that:

1. Dr. RAMANUJA IYENGAR, Head of Cardiology at St. Francis Hospital, Miami Beach, Florida, be and the same is hereby appointed to examine the defendant, HARRIS LEVENSON, JR., and thereafter

to report back to this Court by a full narrative report, a copy of which shall be sent to JOEL HIRSCHHORN, Attorney for the defendant, 742 N.W. 12th Avenue, Miami, Fla. 33136, and to Assistant State Attorney MICHAEL VOIGT, Sixth Floor, 1351 N.W. 12th Street, Miami, Florida, 33125.

2. Dr. Ramanuja Iyengar's report shall set forth in detail his medical findings with respect to defendant's medical condition and in addition shall advise this Court, based upon reasonable medical certainty, whether the defendant, HARRIS LEVENSON, JR., is able to serve a period of three hundred sixty-four days incarceration in the Dade County Stockade without jeopardizing his life or seriously impairing his health.

3. This cause is currently scheduled for report on August 22, 1977; accordingly, the defendant shall forthwith [R 104] arrange his appointment with Dr. Ramanuja Iyengar. In the event Dr. Ramanuja Iyengar is unable to report back to this Court in writing on August 22, 1977, at 9:00 o'clock A.M., then Dr. Ramanuja Iyengar shall contact Attorney Joel Hirschhorn, 324-5320, who shall thereafter so advise this Court in order that a new date be scheduled for report regarding defendant Harris Levenson, Jr.'s medical condition.

DONE and ORDERED at Miami, Dade County, Florida, this 10 day of August, 1977.

LEONARD RIVKIND
CIRCUIT JUDGE

Copies furnished to:

Joel Hirschhorn, Esq.
Attorney for defendant

Michael Voigt, Esq.
Assistant State Attorney

Dr. Ramanuja Iyengar

[R-105]

August 11, 1977

Honorable Leonard Rivkind
Circuit Court Judge
Dade County, Florida

RE: Mr. Harris Levenson, Jr.

Mr. Harris Levenson, Jr. was examined by me on August 10, 1977. He gave history of having had colectomy at St. Francis Hospital in March, 1977. At that time he was found to have a polyp without any evidence of cancer. He also is known to have chronic diverticulosis of the colon with recurrent pain. The patient also gave history of hypertension for a number of years which has been controled intermittently. At this time he complained of frequent dizziness along with headache which probably is related to hypertension. He also gave history of frequent palpitation and on two occasions his private physician, Dr. Leonard Jacobson converted it to regular sinus rhythm by carotid stimulation. He denies history of chest pain or symptoms of congestive cardiac failure. At the time I saw him he was taking Quinidine for his irregular heart rhythm.

On physical examination he was found to be [illegible] with a pulse of 80 per minute, blood pressure was [illegible] which is elevated. Examination of the eyes revealed early changes [illegible] hypertension in his retina. Examination of the heart revealed slight enlargement of the heart without any abnormal murmurs or heart sounds. The lungs were clear. There was no enlargement of the liver or spleen. A surgical scar was noted in the upper part of the abdomen.

Electrocardiogram revealed sinus rhythm with incomplete right bundle branch block and left atrial enlargement. At the time of examination occasional premature ventricular beats were noted.

Chest X-ray revealed mild left ventricular enlargement without any evidence of pneumonia or congestive cardiac failure.

In summary, Mr. Levenson has the following problems:

1) Hypertensive cardiovascular disease is evidenced by elevated blood pressure and moderate left ventricular enlargement and minimal abnormal electrocardiographic changes. He also has history of recurrent palpitations and premature ventricular contractions.

[R-106]

2) Chronic diverticulitis of the sigmoid colon and recent colectomy for villous adenoma of the colon.

The patient should be under constant medical care to control his blood pressure more adequately and he should also continue the Quinidine to control his irregular heart beat which has to be monitored also. The patient should also be on a special bland diet as well as low residue diet to control the symptoms related with diverticulitis. The patient should also be on a low salt diet in view of hypertension.

In view of the multiple medical problems which needs special dietary restrictions along with constant medical care, I feel that his health will be in jeopardy if he is confined to the Dade County Stockade for a period of three hundred and sixty-four days.

If you need further information feel free to contact me.

Thanking you,

Sincerely yours,

/s/ Ramanuja Iyengar, M.D.

pc: Joel Hirschhorn, Esq.
Attorney for defendant

Michael Voigt, Esq.
Assistant State Attorney
RI:et

[R-107]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 76-9035A (Rivkind)

STATE OF FLORIDA,

Plaintiff,

vs.

HARRIS LEVESON,

Defendant.

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE PLEA, RECUSE TRIAL COURT, OR, IN THE ALTERNATIVE, TO COMPEL COMPLIANCE WITH PLEA BARGAIN UNDERSTANDING

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared JOEL HIRSCHHORN, who, after being duly sworn, upon oath, deposes and says that:

1. Your affiant is an attorney licensed to practice law in the State of Florida and has been so licensed since November, 1967. Your affiant engages primarily in the practice of Criminal Defense Law.

2. Your affiant was at all times material hereto attorney-of-record for HARRIS LEVESON, one of the Defendants in the case styled "State of Florida v. Harris Leveson, et al," Dade County Circuit Court Criminal Division Case No. 76-9035.

3. At all times material hereto, the undersigned sought to negotiate a plea on behalf of the Defendant, HARRIS LEVESON (and two other Defendants charged in the same case, whose cases are not here relevant), by negotiating with Assistant State Attorney Michael Voigt, both in and out of the presence of the Presiding Judge herein, the Hon. Leonard Rivkind. Based primarily on Defendant HARRIS LEVESON'S health and medical [R-114] problems, the undersigned sought to obtain a plea involving an adjudication of "Guilty" for the Defendant LEVESON and the imposition of a probationary sentence, rather than one involving jail time. The State's position throughout all these negotiations was that it desired not only conviction and adjudication, but, also, the imposition of a jail sentence. Several months prior to Monday, August 1, 1977, the undersigned obtained from HARRIS LEVESON'S medical doctor, a series of letters which indicated that HARRIS LEVESON had substantial medical difficulties. Copies of these letters were delivered to the Hon. Leonard Rivkind and Assistant State Attorney Michael Voigt. Thereafter, plea negotiations were engaged in by the undersigned directly with the Court, always in the presence of a representative of the State Attorney's Office.

4. On or about August 1, 1977, in Chambers, and in the presence of Assistant State Attorney Michael Voigt, the Hon. Leonard Rivkind led the undersigned, as

attorney for HARRIS LEVESON, to believe that if MR. LEVESON'S health and medical condition was such that the imposition of a jail sentence, such as 364 days in the Dade County Stockade would be harmful and/or jeopardize his health, then the said Hon. Leonard Rivkind would not impose a jail sentence. The said Hon. Leonard Rivkind made it quite clear to the undersigned that he desired to appoint an impartial doctor to examine the said HARRIS LEVESON to determine, for the Court's benefit, the status of HARRIS LEVESON'S health and what effect, if any, incarceration would have on the said HARRIS LEVESON.

5. The undersigned unequivocally understood the Court, in Chambers and outside the presence of a Court Reporter and the Defendant, to state that if the court-appointed doctor indicated incarceration would be harmful and/or jeopardize HARRIS LEVESON'S health, then the Court would not require HARRIS LEVESON to serve 364 days in the Dade County Stockade. The undersigned communicated same to HARRIS LEVESON as a result of [R-115] which HARRIS LEVESON entered the plea set forth more fully in the transcript of August 1, 1977.

FURTHER, AFFIANT SAYETH NOT.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

SWORN to and subscribed before me this 15th day of September, 1977.

/s/ Paula Young
Notary Public, State of Fla.
My Commission Expires:
Mar 24, 1978

I HEREBY CERTIFY that a true and correct copy of the foregoing Affidavit was hand delivered to MICHAEL VOIGT, Assistant State Attorney, 1351 N.W. 12th Street, Miami, Fla. 33125 this 15th day of September, 1977.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

[R-116]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 76-9035A (Rivkind)

THE STATE OF FLORIDA,

Plaintiff,

vs.

HARRIS LEVESON,

Defendant.

AFFIDAVIT

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared HARRIS LEVESON, who, after being duly sworn, on oath deposes and says that:

1. My name is HARRIS LEVESON, and I am the Defendant in the above-styled cause.

2. I pled "Guilty" in this case because I believed, based on conversations I had with my attorney, JOEL HIRSCHHORN, who represented to me that he had had several converstions with the Hon. Leonard Rivkind,

that if the court-appointed doctor confirmed my poor health and the fact that incarceration would likely jeopardize my health or be harmful to my health, then the Trial Judge, the Hon. Leonard Rivkind, would not require me to serve 364 days in the Dade County Stockade.

3. I understood, based on the discussion in Open Court, the day I pled "Guilty", on August 1, 1977, that the Judge placed me on five years' probation and tentatively made a special condition of the probation that I serve 364 days in the Dade County Stockade; I further understood that the Judge had not made up his mind as to whether or not I would actually have to serve said [R-117] 364 days and would not do so unless and until he received a clear and unequivocal letter from the court-appointed doctor which would indicate whether said incarceration would be harmful to my health or not.

4. When the Hon. Leonard Rivkind first imposed the special condition, he indicated that the "surrender" date for me would be August 22, 1977. My attorney at that time questioned the Court as to whether or not that was a "surrender" or a "report" date. The Court concurred with my attorney that the August 22, 1977 date was a "report" date as the Court had not yet made up its mind as to whether or not to require me to serve said 364 days in Dade County Stockade and the Court was awaiting a report from the court-appointed doctor.

5. Shortly after Dr. Iyengar was appointed, I went to see Dr. Iyengar and he examined me. I am familiar with Dr. Iyengar's letter of August 11, 1977 and his findings therein which indicate that my health will be in

jeopardy if I am confined to the Dade County Stockade for a period of 364 days.

6. On August 22, 1977, I appeared before the Hon. Leonard Rivkind with my attorney and was advised by the said Judge at that time that despite Dr. Iyengar's clear and unequivocal letter, he intended to require me to serve said 364 days; I was shocked because I had understood from the Court, impliedly at least, and from my attorney, that if Dr. Iyengar, as court-appointed doctor, indicated that said incarceration would be harmful or jeopardize my health, that I would not have to serve the 364 days in the Stockade. I heard Judge Rivkind tell my attorney in Court that he had spoken to Dr. Iyengar regarding my incarceration. I also spoke with Dr. Iyengar shortly after August 22, 1977 and Dr. Iyengar reassured me that he had confirmed, orally, to Judge Rivkind, in a telephone call apparently initiated by Judge Rivkind that everything in the contents of his letter of August 11, 1977 were accurate and that Dr. Iyengar further stated to Judge Rivkind that incarceration would be harmful to my health and my health was likely to be in jeopardy [R-118] if I was confined to the Dade County Stockade for a period of 364 days. Based on my conversation with Dr. Iyengar shortly after August 22, 1977, I am convinced and do believe that Dr. Iyengar never suggested to Judge Rivkind anything contrary to what is set forth in his clear and unequivocal letter of August 11, 1977.

7. Further, I pled "Guilty" upon advice of my attorney because I understood that the plea negotiations in this case were a "package" deal involving my two co-defendants. In short, I understood clearly that the State would not accept a plea of "Guilty" from anyone or two

of the three defendants, but rather insisted on pleas as to all three defendants. Had I known that Judge Rivkind would not follow the recommendation of the court-appointed doctor, I would not have pled "Guilty". I pled "Guilty" because my own personal physician, Dr. Leonard H. Jacobson had, in a series of letters directed to my attorney, which I understand my attorney has filed with this Court, had indicated to the Court that my health was such that incarceration would be harmful and likely to jeopardize my medical condition.

8. I honestly and sincerely feel that the Court has failed to abide by its agreement with my attorney and further has misled me during the plea discussions on August 1, 1977 in open court as I was convinced throughout said plea discussions that the Court intended to place me on probation for a period of five years and not require me to serve the said 364 days in the Dade County Stockade if the court-appointed doctor indicated, as he has, that said incarceration would jeopardize my health.

FURTHER, AFFIANT SAYETH NOT.

/s/ Harris Leveson
HARRIS LEVESON

SWORN to and subscribed before me this day of September, 1977.

/s/ [illegible]
Notary Public, State of Florida
My Commission Expires:
November 24, 1978

I HERE CERTIFY that a true and correct copy of the foregoing Affidavit was hand delivered to MICHAEL VOIGT, Assistant State Attorney, 1351 N.W. 12th Street, Miami, Fla. this 15th day of September, 1977.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

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